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No. 80-1012

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BAXTER RICE, Director, Department of Alcoholic Beverage Control of the State of California,

Petitioner,

v.

NORMAN WILLIAMS COMPANY, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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United States Brewers Association (USBA) moves pursuant to Rule 36 of the Rules of this Court for leave to file the annexed brief *amicus curiae* in support of the petition for writ of certiorari. Consent to the filing of this brief has been obtained from counsel for petitioners. A copy has been lodged with the clerk of the Court. Respondents have denied their consent.

USBA is a trade association representing 33 brewers of malt beverages, ten affiliated members who either brew or import foreign malt beverages, and over 100 associate members engaged in related businesses. They collectively conduct business in all 50 states, the District of Columbia and Puerto Rico. USBA's member brewers are responsible for approximately 75 percent of all beer sales in the United States.

USBA is organized under the laws of New York. Its principal purposes are to contribute to the growth, prosperity

and welfare of the brewing industry; to collect, prepare and disseminate information relating to the industry or of interest to its members; to oppose unfair or improper practices inimical to the industry; and to cooperate with government agencies to secure observance of applicable legal requirements. USBA's Board of Directors has authorized the filing of a brief *amicus curiae* in support of the petition for writ of certiorari in this case.

This case has special significance to USBA. Statutes similar to that invalidated here, known as "designation" or "primary source" laws, are now in effect in at least fifteen other states and the District of Columbia. Malt beverages brewed or sold by USBA's members are subject to many of these laws. The decision in this case places the validity of these other designation and primary source laws in substantial doubt, and USBA and its members have a direct interest in the prompt resolution of those doubts. Further, the state court's decision raises important questions regarding the proper application to state liquor controls of the federal antitrust laws, in accordance with this Court's recent decision in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). USBA's members are subject to numerous state liquor control laws that may, unless further guidance is provided by this Court, be challenged under the federal antitrust laws. Delay, uncertainty and inconsistency are likely to result from such challenges.

USBA's interests in this case differ only slightly from those of the existing parties. The California statute involved here is applicable only to distilled spirits, and the interests of the existing parties relate principally to the statute's implications for the importation and sale of such spirits within California. The Court's disposition of this petition will, however, seriously affect the validity of numerous similar statutes outside California, many of which are applicable to malt beverages. Without the participation of USBA as *amicus curiae*, the Court will not have before it the views of persons interested in the distribution and sale of malt beverages in those other states whose statutes will be affected by the Court's action.

For these reasons, United States Brewers Association requests that this motion to file the annexed brief *amicus curiae* be granted.

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BRIEF OF AMICUS CURIAE UNITED STATES BREWERS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS

The interest of *amicus* is set forth in the preceding motion for leave to file this brief.

REASONS FOR GRANTING THE WRIT

In its decision in this case, the California Court of Appeal held, without trial or even an evidentiary hearing, that Section

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[1] Although this brief *amicus curiae* is addressed specifically to the petition in No. 80-1012, filed on behalf of the Director of California's Department of Alcoholic Beverage Control, companion petitions seeking review of the same California decision also have been filed with the Court in Bohemian Distributing Co. v. Norman Williams Co., No. 80-1030, and Wine & Spirits Wholesalers of Calif. v. Norman Williams Co., No. 80-1052. In USBA's view, all three petitions should be granted and consolidated for argument.

23672 of the California Business and Professions Code, as amended by Assembly Bill No. 499,[2] is invalid by reason of its asserted inconsistency with the federal antitrust laws. The reasons for review by this Court are several and important. The state court's decision ignores long-established federal and constitutional policies, conflicts with recent decisions of this Court, misconstrues the requirements of the federal antitrust laws, and wrongly casts doubt on the validity of similar statutes adopted by at least fifteen other states and the District of Columbia.[3] Review by this Court is imperative to restore important constitutional principles, resolve the conflicts and clarify the extent of state authority regarding significant issues of public policy.

I.

The state court's decision ignores longstanding federal and constitutional policies.

It has been settled almost since the nation's beginning that the states have broad authority to regulate the importation and distribution of alcoholic beverages within their borders. At least as early as *Peirce v. New Hampshire,* 46 U.S. (5 How.) 554 (1847), this Court recognized the states' wide discretion regarding the distribution of such products. The powers of the states were later confirmed and even extended by the Wilson Act, ch. 728, 26 Stat. 313 (1890),[4] the Webb-Kenyon Act, ch.

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[2] Stat. 1979, ch. 280, § 1. In pertinent part, the statute provides as follows:

> "A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent."

[3] Minor variations in the terms of the different statutes make any precise count difficult, but such statutes exist in at least 16 jurisdictions other than California. *See* petition in No. 80-1012, at 28-29. *Compare* petition in No. 80-1052, at 5 and Appendix E.

[4] The Wilson Act, now found at 27 U.S.C. § 121, restored state authority over the sale of liquor in its original package, as that authority had been understood to exist prior to Leisy v. Hardin, 135 U.S. 100 (1890).

90, 37 Stat. 699 (1913),[5] and the Collier Act, ch. 740, § 202(b), 49 Stat. 877 (1935).[6] In each of these successive statutes, Congress acknowledged and protected the state's authority. In each of them, Congress relinquished portions of its own constitutional powers of regulation under the Commerce Clause. *Dugan v. Bridges,* 16 F. Supp. 694, 703-04 (D. N.H. 1936) (three-judge court), *appeal dismissed,* 300 U.S. 684 (1937). Finally, any possible uncertainty as to the breadth of the states' authority in this area was removed by the adoption in 1933 of the Twenty-first Amendment to the Constitution. *See Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. 35 (1966).

In a lengthy series of cases, this Court has construed first the federal statutes and later the Twenty-first Amendment to give the states broad authority to structure and control the local distribution of alcoholic beverages within their borders. *E.g., State Board of Equalization v. Young's Market Co.,* 299 U.S. 59 (1936); *Mahoney v. Triner Corp.,* 304 U.S. 401 (1938). It has long been settled that, "unfettered by the Commerce Clause," a state may absolutely prohibit the manufacture, transportation, sale and even possession of intoxicants. *Ziffrin, Inc. v. Reeves,* 308 U.S. 132, 138 (1939). Correspondingly, a state may elect to permit the local distribution of alcoholic beverages only under stringent conditions prescribed by the state within its "large discretion." *Id.* at 138-39.[7]

These long-established principles have recently been confirmed by this Court. In *California Retail Liquor Dealers Ass'n*

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[5] The Webb-Kenyon Act, now found at 27 U.S.C. § 122, prohibits the shipment or transportation of liquor into any state, territory or district in violation of the laws of that jurisdiction.

[6] The Collier Act reenacted without change the Webb-Kenyon Act.

[7] *See also, e.g.,* Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939); Finch & Co. v. McKittrick, 305 U.S. 395 (1939). In *Finch,* Justice Brandeis observed that, since the Twenty-first Amendment, "the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause." *Id.* at 398.

v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), decided only last Term, the Court described the standards by which state liquor controls, the Twenty-first Amendment and the federal antitrust laws are to be accommodated. Although it there invalidated a state statute,[8] the Court left no doubt of the broad authority afforded the states.[9] Even more recently, the Court dismissed for want of a substantial federal question an appeal from a decision of the Kansas Supreme Court sustaining a state statute very similar to that invalidated in this case. *Colby Distrib. Co., Inc. v. Lennen,* 227 Kan. 179, 606 P.2d 102, *appeal dismissed sub nom. Grant-Billingsley Wholesale Liquor Co., Inc. v. Lennen,* 49 U.S.L.W. 3331 (Nov. 3, 1980).[10]

The state court's decision ignored or misunderstood these well-settled principles. Despite the states' "large discretion" regarding the importation and distribution of alcoholic beverages, it invalidated Assembly Bill No. 499 with only a cursory examination of the state's interests and powers. Despite this Court's decisions in *Midcal* and *Colby,* it misapplied the federal antitrust laws and misunderstood the limits of state authority. Unless review is granted by this Court, an important area of public policy, involving similar statutes adopted by numerous other states and the District of Columbia, will be left confused and uncertain.

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[8] It is significant, however, that state authorities made little effort to support the statute in *Midcal. Id.* at 111 n.12. In contrast, state authorities here have vigorously defended Assembly Bill No. 499 and now seek review by this Court of the state court's decision. *See* petition in No. 80-1012, at 49-50.

[9] For example, the Court carefully emphasized that:

> "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Id.* at 110.

[10] Indeed, the Kansas statute sustained in *Colby* goes even further than Assembly Bill No. 499, in that it prohibits a supplier from designating more than one wholesaler for a particular brand in a particular local geographical area, which may include the entire state. If, as this Court found, no substantial federal question is presented by the Kansas statute, *a fortiori* no federal impediment exists to the enforcement of Assembly Bill No. 499.

II.

The decision in this case ignored important state interests served by Assembly Bill No. 499.

Without pausing to conduct any factual inquiry, the California court concluded, after an examination merely of briefs and pleadings, that Assembly Bill No. 499 will not "clearly" vindicate any significant state interests.[11] By so doing, the court disregarded rudimentary principles for determining the validity of state legislation under the Constitution. Fifty years ago, in an opinion by Justice Brandeis, this Court emphasized that state legislation is entitled to a "presumption of constitutionality" that must prevail "in the absence of some factual foundation of record for overthrowing the statute." *O'Gorman & Young, Inc. v. Hartford Fire Ins. Co.*, 282 U.S. 251, 257-58 (1931). Under the presumption, no burden lies upon the state to establish the purposes for which the statute was intended. To the contrary, state legislation may be invalidated only if a factual showing is first made that "evils do not exist" for which the statute might be "an appropriate remedy." *Id.* at 258. The failure of the California court to give deference to the presumption of constitutionality, and its unsupported conjecture that the statute cannot "clearly" serve any state interest, alone warrant review by this Court.[12]

In any event, the important state interests served by Assembly Bill No. 499 are readily discernible even from the

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[11] Appendix to the petition in No. 80-1012, at 30.

[12] The presumption of constitutionality described in *O'Gorman* has been frequently applied and reiterated by this Court in more recent cases. *See, e.g.*, Olsen v. Nebraska, 313 U.S. 236 (1941); Lincoln Fed. Lab. Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Ferguson v. Skrupa, 372 U.S. 726 (1963); New Orleans v. Dukes, 427 U.S. 297, 303-04 (1976) (per curiam). *See also* Hamilton, *The Jurist's Art*, 31 Colum. L. Rev. 1073 (1931); L. Tribe, *American Constitutional Law*, § 16-3 (1978).

court of appeal's fragmentary analysis. The court itself recognized that without the statute wholesalers in California would be free to obtain distilled spirits through an "Oklahoma connection."[13] It is apparent that the statute is intended, among other purposes, to permit more effective monitoring of distilled spirits imported into the state, prevent circumvention of the state's other control provisions, and assist in the collection of revenues. Whether Assembly Bill No. 499 is the best or only method for achieving these goals is immaterial. It matters only that California and other states have "large discretion" to structure the distribution of alcoholic beverages within their borders as they deem appropriate. No court, whether federal or state, has authority under the Constitution to serve as a "super-legislature to weigh the wisdom" of a state's legislative exercise of such discretion. *Day-Brite Lighting, Inc. v. Missouri,* 342 U.S. 421, 423 (1952); *Ferguson v. Skrupa,* 372 U.S. 726, 731 (1963).

III.

No conflict exists between Assembly Bill No. 499 and the federal antitrust laws.

The state court's decision assumed that Assembly Bill No. 499 permits private conduct that restrains trade and undermines federal policies embodied in the Sherman Act.[14] Every detail of the court's analysis is mistaken. Contrary to the decisions of this Court, the California court seriously misunderstood the federal antitrust laws and wrongly presumed the

[13] Appendix to the petition in No. 80-1012, at 6. As stated by the petitioners in No. 80-1052, at page 7, it would be feasible for the "Oklahoma connection", that is the Oklahoma wholesaler, to order distilled spirits from an Illinois distiller with instructions to route the product directly for delivery into California. California's authority to protect against such illusory "paper transactions" is surely indisputable.

[14] Appendix to the petition in No. 80-1012, at 12-21.

existence of a novel and unjustified category of *per se* violations of the Sherman Act. Review is required here to clarify the application of the antitrust laws to an important area of public policy.

It is significant that Assembly Bill No. 499 does not alter or extend the existing right of brand owners to select the wholesalers with whom they elect to deal. For more than 60 years it has been understood that brand owners enjoy the right unilaterally to choose their wholesalers. *United States v. Colgate & Co.*, 250 U.S. 300 (1919); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 76, 78 (9th Cir. 1969), *cert. denied*, 396 U.S 1062 (1970). Under the California statute, brand owners remain free to deal with as many or as few of the state's licensed wholesalers as they individually elect, based upon their own separate marketing policies. The statute does not, however, authorize horizontal agreements among brand owners regarding the number or identity of their wholesalers, or any other question. With respect to all such matters, no conflict exists between Assembly Bill No. 499 and the requirements of the federal antitrust laws.[15]

Nor is any conflict necessarily created because the California statute prevents those wholesalers who have not been designated as authorized importers from purchasing distilled spirits through an "Oklahoma connection." In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), this Court held that vertical restraints imposed upon distributors by manufacturers do not *per se* violate the Sherman Act, but instead must be evaluated through the rule of reason, based upon a detailed factual assessment of the justifications for and economic consequences of the restraints. In this case, however, the California court did not pause to undertake any such factual analysis. Instead, misconstruing *GTE Sylvania*, the court simply presum-

[15] It is doubtless true that Assembly Bill No. 499, or any other legislative enactment, might at some future moment be susceptible of abuse. It is well-settled, however, that the mere future possibility of abuse cannot justify the invalidation of state legislation. *E.g.*, Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 45-46 (1966).

ed that Assembly Bill No. 499 authorizes on its face *per se* violations of the antitrust laws.

This Court has repeatedly warned against hasty and superficial analyses of the difficult issues of federalism presented here. In *Midcal,* the Court emphasized that "no bright line" divides state and federal powers in this area, and held those powers may be accommodated only through a "careful scrutiny" performed within the discipline of a "concrete case." 445 U.S. at 110. In other decisions, the Court has cautioned that state legislation is not invalid merely because it may be thought to involve anticompetitive consequences or to permit private conduct that might violate the antitrust laws.[16] In all these cases, the Court has made clear that the application of the antitrust laws to state legislation cannot be determined abstractly or without detailed examination of an appropriate factual record. The California court's effort to dispose of this case without such a record, on the basis merely of its misunderstanding of *GTE Sylvania,* has introduced disorder and uncertainty into an important area of public policy.

IV.

Assembly Bill No. 499 constitutes state action exempt from the federal antitrust laws.

The California court's misapplication of the antitrust laws was compounded by its failure to follow the state action doctrine established in *Parker* v. *Brown,* 317 U.S. 341 (1943), *Midcal* and other cases. Without troubling to examine the comprehensive regulatory system of which Assembly Bill No. 499 forms only a small part, the court of appeal assumed that state authorities could not be sufficiently involved in the statute's administration to constitute state action. No basis exists for the court's conjecture.

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[16] *See, e.g.,* Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. at 45-46; Exxon Corp. v. Maryland, 347 U.S. 117, 133 (1978).

First, it is important that Assembly Bill No. 499 was never permitted even to go into effect. Until state authorities have been permitted reasonable opportunities to implement the statute, it can hardly be presumed that they will not be sufficiently involved in its administration to satisfy the state action doctrine. Second, the court ignored other provisions of California law under which state authorities have broad powers to supervise the application of Assembly Bill No. 499. Both the California Constitution, article XX, section 22, and Section 25750 of the California Business and Professions Code give petitioner and the Department of Alcoholic Beverage Control wide-ranging authority to promulgate regulations regarding the importation and control of alcoholic beverages. Indeed, supervisory regulations already exist that require out-of-state shippers of distilled spirits both to obtain appropriate certifications and to identify the wholesalers whom they have designated as authorized importers.[17] No reference was made by the court of appeal to any of these regulatory provisions.

The California court's cursory examination of the state action issue illustrates vividly the importance of review by this Court. Relying exclusively upon purported requirements of federal law, the court of appeal invalidated California's reasonable exercise of the "large discretion" afforded every state regarding the importation and distribution of alcoholic beverages. By so doing, the court introduced uncertainty and confusion into an area of substantial state concern, ignored long-settled constitutional principles, and invited needless litigation regarding similar statutes adopted by other states and the District of Columbia.[18] Guidance from this Court is urgently needed to resolve the uncertainty and prevent the unnecessary burdens of additional litigation.

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[17] These regulatory provisions are reprinted in Appendix F to the petition in No. 80-1052.

[18] Ironically, the District of Columbia provisions were adopted pursuant to authority granted by Congress. *See* District of Columbia Alcoholic Beverage Control Act, 48 Stat. 319 (1934), codified at D.C. Code §§ 25-101 *et seq.*

CONCLUSION

For the reasons above stated, the petition for writ of certiorari, together with the companion petitions in Nos. 80-1030 and 80-1052 should be granted.

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